LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 30 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 728

DON FLEMING, d/b/a GREEN VALLEY FEED MILL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

J. R. MODRALL,
Modrall, Seymour, Sperling,
Roehl & Harris,
1200 Simms Building,
P. O. Box 466,
Albuquerque, New Mexico,
Attorneys for Petitioner.

LELAND S. SEDBERRY, JR.,
GEORGE T. HARRIS, JR.,
Of Counsel.

TABLE OF CONTENTS

OPINIONS BELOW	2
JURISDICTION	2
STATUTE IN QUESTION	2
QUESTION PRESENTED	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	5
SUMMARY	16
APPENDIX	i-xii
Opinion	i
Judgment	xii

CITATIONS

CASES:	
United States v. McNinch, 356 U.S. 595	6, 7, 8, 10
United States ex rel. Brensilber v. Bausch & Lomb Optical Co., 131 F.2d 545	6, 9, 11, 13
United States ex rel. Marcus v. Hess, 127 F.2d 233	6, 8
Rainwater v. United States, 356 U.S. 590	6, 13
Toepleman v. United States, 263 F.2d 697	9, 10
United States v. Ueber, 299 F.2d 310	9
Hillgrove v. Wright Aeronautical Corp., 146 F.2d 621	9
United States v. U. S. Cartridge Co., 95 F.Supp. 384	9,14
United States v. Shapleigh, 54 Fed. 126	9
United States v. National Wholesalers, 236 F.2d 944	9, 11, 14

United States v. Schmidt, 204 F.Supp. 540 — 10, 14

United States v. Park Motors, 107 F.Supp. 168 — 10, 11

United States v. Goldberg, 158 F.Supp. 544 — 10, 11

Mandel v. Cooper Corp., 42 F.Supp. 317 — 10

United States v. Toepleman, 141, F.Supp. 677 — 10

Cahill v. Curtis-Wright Corp., 57 F.Supp. 614 — 10, 11, 13

Contra United States v. Fox Lake State Bank, 255 F.Supp. 723 — 10, 11

Morissette v. United States, 342 U.S. 246 — 11, 14, 16

Fleming v. United States, 336 F.2d 475, 478 — 13

STATUTES:

United States Code Annotated, Title 31:
Section 231 — 2, 4, 6, 7, 9, 11, 12, 15

IN THE

Supreme Court of the United States

OCTOBER TERM 1964

DON FLEMING, d/b/a GREEN VALLEY FEED MILL, *Petitioner,* vs. UNITED STATES OF AMERICA, *Respondent.*	NO.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners pray that the writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circut, entered in the above-entitled case on September 3, 1964 (Appendix Page xi).

OPINIONS BELOW

There is no written opinion of the district court. The judgment of the district court is printed in the transcript at Page 65.

The opinion of the court of appeals is reported at 336 F.2d 475 and is printed in the Appendix at Pages 1-10.

JURISDICTION

The judgment of the court of appeals, affirming the district court, was entered September 3, 1964.

The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTE IN QUESTION

Section 31 of the False Claims Act, 31 U.S.C.A. § 231 et seq., provides as follows:

"Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, *who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent,* or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing

the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit." (Emphasis supplied.)

QUESTION PRESENTED

Whether in a civil suit for damages under the Federal False Claims Act (31 U.S.C.A. § 231) the Government must prove that the defendant had an intention to deceive and prove fraud in its accepted sense.

STATEMENT OF THE CASE

This is a civil action by the United States to recover a civil penalty and forfeiture of $2,000.00 in each of 233 counts, together with double damages and costs, for an alleged violation of the Federal False Claims Statute, 31 U.S.C.A. 231. The Government introduced 15 purchase orders executed by the defendant, or his bookkeeper, in connection with the 1955 Emergency Feed Program of the Commodity Stabilization Service and the Commodity Credit Corporation, of the Department of Agriculture. 20 F.R.7562 (1955) Government's Exhibit 34 (Tr. 1, 27).

The defendant Mr. Fleming was a certified dealer under the program, for the years 1954, 1955, and 1956 (Tr. 23, 57). Farmers who were determined to be eligible under the program were issued purchase orders by the County ASC Committee (Tr. 24). The Farmers then delivered the purchase order to a certified feed dealer (Tr. 24). The feed dealer then signed the following statement and returned the purchase order to the ASC Committee (Tr. 25). "I certify that I have sold and actually delivered to the above-named farmer the designated surplus feed grains and approved mixed feed." (Tr. 59, 60 and Exhibits 1 through 15). The evidence showed and the defendant admitted that at the time of the endorsement of the purchase orders the defendant filled out an invoice for the amount of the purchase

order, and the amount was credited to the farmer's account. A copy of the invoice showing this transaction was attached to the purchase order (Tr. 32-33, 35-36, 40, 46, 51). Physical delivery of the feed was made at a later date, but the dates were not shown (Tr. 36, 46, 55). All of the grain was delivered to the farmers with the exception of a $296.00 order to a Mr. Beasley who refused to accept the feed (Tr. 55).

The Court below found in favor of the Government. The Court adopted all of the Government's findings and refused all of the defendant's findings (Tr. 19). Judgment was entered for the Government in the total amount of $30,792.40; constituting a $2,000.00 forfeiture for each of fifteen claims presented in the sum of $30,000.00 and a further amount of $792.40 being double the amount of $396.20, the actual damages sustained by the plaintiff together with costs (Tr. 20). Defendant filed notice of Appeal and Statement of Points Upon which He Intends to Rely (Tr. 20, 21). The basic question involved is whether or not there is substantial evidence of fraud as required by the statute, and whether or not the Court strictly construed the statute.

The Tenth Circuit Court of Appeals affirmed the district court and decided that the Government was not required to prove fraud. The court affirmed the judgment based upon findings that the defendant certified to an untrue statement.

REASONS FOR GRANTING THE WRIT

Petitioner submits that the element of proof necessary under the statute in question constitutes an important question of federal law. Petitioner further submits that the opinion of the Tenth Circuit Court of Appeals in this case is contrary to previous opinions of the Supreme Court and

is in conflict of opinions of other circuit courts of appeals and district courts.

A. The opinion is contrary to previous pronouncements of this Court. The Tenth Circuit Court of Appeals' opinion states that the element of intent to defraud and proof of fraud is not a necessity under the portion of the Act involved in this case. The opinion quotes the entire Act and then states that there are six different eventualities which will give rise to liability under the Federal False Claim Act. The court states in its opinion that:

> "Only the third and fifth of such eventualities contains the element of fraud or intent to defraud as an absolute, rather than alternative element. Had Congress intended to incorporate fraud or intent to defraud into each portion of the Act, it is unlikely that it would have done so expressly in two portions and not in the remaining portions." (Appendix Page 8), (336 F.2nd 475, 479)

This Court has previously held that intent to defraud is a necessary prerequisite to civil liability under the False Claims Act. *United States v. McNinch*, 356 U.S. 595, 78 S.Ct. 950, 2 L.Ed. 2nd 1001; *United States ex rel. Brensilber v. Bausch & Lomb Optical Co.*, 131 F.2nd 545 (2d Cir.), affirmed 320 U.S. 711, 64 S.Ct. 187, 88 L.Ed. 417; *United States ex rel. Marcus v. Hess*, 127 F.2nd 233 (3rd Cir.), reversed 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443; *Rainwater v. United States*, 356 U.S. 590, 78 S.Ct. 946, 2 L.Ed.2nd 996.

The several opinions considering this Act have always referred to proof of fraud as the proof necessary for recovery. In *Rainwater v. United States, supra*, the principal contention was that a claim against the Commodity Credit Corporation was not a claim against the Government of the

United States under the False Claims Act. There, however, the Court states:

> "The act was originally passed in 1863 after disclosure of wide-spread fraud against the Government . . . it seems quite clear that the objective of Congress was broadly to protect the funds and property of the Government from fraudulent claims . . ." 356 U.S. 590, 592, 78 S.Ct. 946, 948.

The Court further stated in referring to the penal portions of the Act that the construction must be carefully restricted since the Civil Act was incorporating provisions of the criminal sections of the statute.

In a case decided at the same time the Court gave further historical information concerning this Act.

> "The False Claims Act was originally adopted following a series of sensational congressional investigations into the sale of provisions and munitions to the War Department. Testimony before the Congress painted a sordid picture of how the United States had been billed for nonexistent or worthless goods, charged exorbitant prices for goods delivered, and generally robbed in purchasing the necessities of war. Congress wanted to stop this plundering of the public treasury. At the same time it is equally clear that the False Claims Act was not designed to reach every kind of fraud practiced on the Government . . ." *United States v. McNinch*, 356 U.S. 595, 599, 78 S.Ct. 950, 952, 2 L.Ed.2nd 1001.

Justice Dougas concurred in part and dissented in part in his opinion but further discussed the element of fraud and stated:

> "The statute, R.S. §§ 3490, 5438, 31 U.S.C. § 231, 31 U.S. C.A. § 231, covers anyone who fraudulently 'makes or

causes to be made, or presents or causes to be presented, for payment or approval * * * any claim' against the United States . . . For the United States has been induced by fraudulent representations to insure these loans . . . But when fraudulent, it represents an effort to 'cheat the United States'." *United States v. McNinch*, 356 U.S. 595, 602, 78 S.Ct. 950, 954, 2 L.Ed.2nd 1001.

The case of *United States ex rel. Marcus v. Hess, supra,* considered the same portion of the Act which is here involved. The principal question involved in that case was whether or not the civil suit under the Act constituted double jeopardy after the Government has prosecuted defendant in a previous criminal action. The court stated the purpose of the Act as follows:

"These provisions, considered together, indicate a purpose to reach any person who knowingly assisted in causing the government to pay claims which were grounded in fraud, without regard to whether that person had direct contractual relations with the government.

"Furthermore, one of the chief purposes of the Act, which was itself first passed in war time, was to stimulate action to protect the government against war frauds.

"We think the chief purpose of the statutes here was to provide for restitution to the government of money taken from it by fraud, and that the device of double damages plus a specific sum was chosen to make sure that the government would be made completely whole." *United States ex rel. Marcus v. Hess,* 317 U.S. 537, 544, 545, 547, 551, 552, 63 S.Ct. 379, 384, 385, 386, 388.

The Marcus case has been cited numerous times by other courts and by this Court for proposition that the Govern-

ment is required to prove fraud in cases under the False Claims Act.

B. The decision of the Tenth Circuit Court of Appeals is in conflict with the decisions of other Circuit Courts deciding the question herein presented. The Tenth Circuit decided that under the section of the statute here involved proof of fraud was not required. The other Circuits have followed the rule that the statute requires a showing of intent to defraud before the Government can recover. *United States ex rel. Brensilber et al v. Bausch & Lomb Optical Co.*, 131 F.2d 545 (2nd Cir.), affirmed 320 U.S. 711, 64 S.Ct. 187, 88 L.Ed. 417, rehearing denied 320 U.S. 814, 64 S.Ct. 256, 88 L.Ed. 492; *Toepleman v. United States*, 263 F.2d 697 (4th Cir.); *United States v. Ueber*, 299 F.2d 310 (6th Cir.); *Hillgrove v. Wright Aeronautical Corp.* 146 F.2d 621 (6th Cir.); *United States v. U. S. Cartridge Co.*, 95 F. Supp. 384, affirmed 198 F.2d 456, certiorari denied 345 U.S. 910, 73 S.Ct. 645, 97 L.Ed. 1345 (8th Cir.); *United States v. Shapleigh*, 54 F. 126 (8th Cir.); *United States v. National Wholesalers*, 236 F.2d 944 (9th Cir.), cert. denied 353 U.S. 930, 77 S.Ct. 719, 1 L.Ed.2d 724 (9th Cir).

The case of *United States ex rel. Brensilber v. Bausch & Lomb Optical Co.*, 131 F.2d 545, (2nd Cir.) is a per curiam opinion by L. Hand, Augustus N. Hand and Clark, Circuit Judges. In defining the statute this court stated that fraud was required. The court said:

> "Nevertheless, the statute certainly makes fraud of some sort the basis of liability and uses the word in its accepted sense of deceit, as appears from the juxtaposition of the three adjectives, 'false', 'fictitious' and 'fraudulent'. Therefore, by hypothesis it would be enough that the claimant secured his contract by deceit, deceit is a

sine qua non; it will not serve that he secured it by any other kind of wrong . . . That was a wrong, but it was not a 'fraud' . . ."

"This would be the necessary result were the statute of the usual kind and entitled to a broad interpretation; but it is not, for it is not only penal, but drastically penal. (citations omitted) For this reason it has been strictly construed." Id., 131 F.2d 545, 546, 547.

The above case was quoted in *United States v. Schmidt*, 204 F.Supp. 540 (D.C. Wis.). The court then stated the rule to be as follows:

"In order to recover the prescribed penalties under this statute, therefore, the United States must prove fraud in its accepted sense, i.e. a false representation of a material fact made with knowledge of its falsity *and with the intent to deceive* the other party, which representation must be believed and acted upon by the party deceived to his damage." Id., 204 F.Supp. 540, 544.

The majority of district court cases considering the question have likewise decided that proof of intent to defraud is a necessary element in cases under the Act here in question. *United States v. Schmidt*, 204 F.Supp. 540 (D.C. Wis.); *United States v. Park Motors*, 107 F.Supp. 168 (D.C. Tenn.); *United States v. Goldberg*, 158 F.Supp. 544 (D.C. Penn.); *Mandel v. Cooper Corp.*, 42 F.Supp 317 (D.C. N.Y.); *Cahill v. Curtis-Wright Corp.*, 57 F.Supp. 614 (D.C. Ky.); *Contra; United States v. Fox Lake State Bank*, 255 F.Supp. 723 (D.C. Ill.); *United States v. Toepleman*, 141, F.Supp. 677 (reversed on other grounds in *United States v. McNinch*, 242 F.2d 359 (4th Cir.), 356 U.S. 595, 78 S.Ct. 950, 2 L.Ed.2d 1001, subsequent opinion at 263 F.2d 697 (4th Cir.).

In a subsequent opinion in the *Toepleman* case at 263 F.2d

697, the court found that fraud existed thus leaving only the *Fox case, supra,* as a decision contra to the majority view that proof of intent to defraud is required.

Further, the courts have strictly construed the provisions of the statute. A Kentucky District Court stated:

> "It has been held that the statute being drastically penal should be strictly construed, and that fraud or deceit is a sine qua non of liability. *United States ex rel. Brensilber v. Bausch & Lomb Optical Company,* 2 Cir., 131 F.2d 545.
>
> *It is likewise settled* that any kind of fraud or deceit on the part of a person in his dealings with the Government is not enough, but that the fraud must be used in connection with making a claim against the Government." (Emphasis supplied) *Cahill v. Curtis-Wright Corp.,* 57 F.Supp. 614 (D.C. Ky).
>
> And in a further case,
>
> "Undoubtedy there must be intent to work a deceit on the government. Probably the rule of Morissette v. United States (citation omitted) should be applied as a test." *United States v. National Wholesalers,* 236 F.2d 944, 950 (9th Cir.).
>
> And further,
>
> "Intent to defraud is a necessary prerequisite to civil liability under the False Claims Act (31 U.S.C.A. §§ 231 ff.)" *United States v. Goldberg,* 158 F.Supp. 544, 548 (D.C. Penn.)

A case similar to the case at hand reached the conclusion that proof of intent to defraud the Government was required. *United States v. Park Motors,* 107 F.Supp. 188 (D.C. Tenn.). The court, further relied upon the *Morissette*

case, supra, as to the requirement of intent to defraud. The distinction as to the two kinds of fraud was pointed out:

> "There is an important distinction between intentionally or knowingly doing a thing having the scienter or intent to defraud or commit a crime." Id. 107 F.Supp. 168, 177 (D.C. Tenn.).

These cases have been cited for two reasons. First, to show the almost universal belief that proof of fraud is a requirement of the False Claims Act. Second, to show that that the Tenth Circuit opinion is contrary to the majority rule.

C. The decision of the Tenth Circuit Court of Appeals not only adversely affects the defendant in this case in an extreme manner, but raises questions of both fundamental and far reaching import in federal law.

The trial court decided the case based merely upon the fact that the defendant certified to something that was not true and correct.

> "The Court: . . . My feeling was that judgment should be entered for the Government, *because he certified to something that was not true and correct,* in that he certified that he had delivered eligible feeds when, in truth and in fact, he had at that time not delivered any feed and thereafter, didn't deliver the eligible feeds but did deliver other feeds that the customer may have ordered." (Tr. 66) (Emphasis ours)

It is clear that the trial court did not find that the defendant had an intention to defraud.

The Circuit Court stated the question presented and its answer to the question as follows:

> "The sole contention raised by Fleming is that the United

States, in order to establish its case under the False Claims Act, must prove all the elements ordinarily required in an action for damages for fraud, and that since the United States did not do so, the court erred in entering judgment for the United States. We are of the opinion that the meaning of the portion of the Act applicable to Fleming is clear and unambiguous and contains no such requirement." *Fleming v. United States*, 336 F.2d 475, 478, Appendix Page vii.

The Court further stated:

"The first portion of the Act, that which the United States claims Fleming violated, provides for liability in the event of a 'false, fictitious *or* fraudulent' claim. By the use of the disjunctive 'or' Congress made it clear that anyone of the three wrongful types of claims would subject the claimant to liability and that the claim need not be 'fraudulent' so long as it is 'false'." Id., 336 F.2d 475, 479. Appendix Page viii.

"Under the first portion of § 231 it is necessary only that the claimant made a claim upon or against the Government of the United States, knowing it to be false, in order to incur liability." Id. 336 F.2d 475, 480, Appendix Page x.

Thus, it is clear that the Tenth Circuit has found that the Government need not prove intent to defraud or fraud in its accepted sense in order to recover.

The penal portion of the Act incorporates provisions of the criminal section of the statute and for that reason construction must be carefuly restricted. *Rainwater v. United States, supra.* It has been held that although the action is civil in nature, it is not only penal, but drastically penal, and for that reason it should be strictly construed. *United States v. Bausch & Lomb Optical Co., supra; Cahill v. Curtiss-*

Wright Corp., supra; United States v. Schmidt, supra. Such construction would require the defendant to prove fraud in its strictest sense. Strict construction of the Act would seem to require that fraud be proved by clear and convincing evidence. *United States v. United States Cartridge Co.*, 95 F.Supp. 384, aff'd. 198 F.2d 456, Cert. denied 345 U.S. 910, 73 S.Ct. 645, 97 L.Ed. 1345.

Although the statute is highly penal in nature, since it is civil the defendant is deprived of any of the protections afforded one being prosecuted under a criminal statute. The burden of proof is different, the constitutional protections do not apply, and yet the penalty is very great. Certainly, the statute should be strictly construed. We submit that the Tenth Circuit construction is not strict.

It seems clear that in a criminal action under this statute it would be necessary to show intent to defraud. *Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288. In that case, the Supreme Court held that criminal intent is an essential element of the crime of knowing conversion of Government property, even though the element of criminal intent was not included in the statute. The Court stated that the trial court's only question was, "Did he intend to take the property?" The court stated,

> "That the removal of them was a conscious and intentional act was admitted. But that isolated fact is not an adequate basis on which the jury should find the criminal intent to steal or knowingly convert, that is, *wrongfully* to deprive another of possession of property." Id. 342 U.S. 246, 276, 72 S.Ct. 240, 256, 96 L.Ed. 288.

The Morissette case, *supra*, has been cited by numerous courts in connection with the requirement of proof of intent to defraud under the Federal False Claims Act. *United*

States v. National Wholesalers, 236 F.2d 944. (9th Cir.), Cert. denied 353 U.S. 930, 77 S.Ct. 719, 1 L.Ed 2d 724. There the court said,

> "undoubtedly there must be the intent to work a deceit on the Government. Probably the rule of Morissette v. United States, . . . should be applied as a test." Id. 236 F.2d 944, 950.

The case at hand presents an important decision of construction of federal law, particularly since the opinion is contrary to the decision of numerous other circuit courts and numerous other district courts. In this day and age when all men must deal with the Government, and when there is great divergence as to what may or may not constitute a claim under the Federal False Claims Act, it is important that the proof necessary for recovery under the Act be defined by this Court. The magnitude of the question is great. Mr. Fleming, the defendant, was sued for filing false claims in 233 counts. The Government proved 15 of these counts and $396.00 in damages. The judgment was entered for $30,792.40. Clearly, the Government did not prove an intention to defraud the Government. Thus, the magnitude of the penalty assessed to Mr. Fleming by the decision of the district court and the opinion of the circuit court in not requiring a strict interpretation of the Act, and by not requiring the Government to prove intent to defraud and fraud in its accepted sense, can be multiplied many fold by further Governmental suits under this Act against multitudes of persons dealing with the Government, and not intending to defraud the Government.

Therefore, we submit that this case should be further examined by this Court to determine whether the Tenth Circuit Court rule is in error, and to give the courts guid-

ance in further cases under this Act. In the words of Justice Jackson under a case with similar facts, we submit that the following applies to the case at hand:

> "This would have remained a profoundly insignificant case to all except its immediate parties had it not been so tried and submitted . . . as to raise questions both fundamental and far-reaching in federal . . . law, for such reason we granted certiorari." *Morissette v. United States*, 342 U.S. 246, 247, 72 S.Ct. 240, 241, L.Ed.

SUMMARY

We respectfully request that this Honorable Court grant a Writ of Certiorari to the Tenth Circuit Court of Appeals in this case for the following reasons.

(a) The opinion of the Tenth Circuit Court of Appeals is contrary to the previous decisions of the United States Supreme Court.

(b) The opinion of the Tenth Circuit Court of Appeals is contrary to the opinions previously given in other courts of appeals.

(c) The opinion of the Tenth Circuit Court of Appeals is contrary to the majority rule followed in United States Courts and is without authority.

(d) The opinion presents an important question of federal statutory interpretation which should be passed upon by this Court.

(e) Most important to petitioner, the decision of the Circuit Court is incorrect, and in error, resulting in imposing a great and unjust penalty upon petitioner which would

not have been imposed had the court followed the correct rules of law, as set forth by this Court and the other Circuits.

Respectfully submitted,

J. R. MODRALL,
Modrall, Seymour, Sperling,
Roehl & Harris,
1200 Simms Building,
P. O. Box 466,
Albuquerque, New Mexico,
Attorneys for Petitioner.

LELAND S. SEDBERRY, JR.
GEORGE T. HARRIS, JR.
of Counsel.

November 23, 1964

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No.

DON FLEMING, d/b/a GREEN VALLEY FEED MILL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

No. 7591

United States Court of Appeals
Tenth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

J. R. MODRALL,
Modrall, Seymour, Sperling,
Roehl & Harris
1200 Simms Bldg.,
P. O. Box 466,
Albuquerque, N. M.,
Attorneys for Petitioner.

LELAND S. SEDBERRY, JR.,
GEORGE T. HARRIS, JR.,
Of Counsel.

OPINION

United States Court of Appeals

FOR THE TENTH CIRCUIT

DON FLEMING, d/b/a GREEN VALLEY FEED MILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

No. 7591

Before PHILLIPS and LEWIS, Circuit Judges, and CHRISTENSEN, District Judge.

ORIE L. PHILLIPS, Circuit Judge.

The United States brought this action against Fleming upon a claim of the Commodity Credit Corporation to recover damages and forfeitures under the False Claims Act, 31 U.S.C.A. § 231 et seq. Trial was had to the court without a jury, at the conclusion of which the court found that Fleming knowingly and with intent to defraud made and presented to the Commodity Credit Corporation 15 false, fictitious and fraudulent claims. Judgment was accordingly entered against Fleming for double damages in the amount of $792.40 and for forfeitures of $2,000 for each of the 15 false, fictitious and fraudulent claims. Fleming has appealed.

Fleming operated a feed mill in Tucumcari, New Mexico, under the name of Green Valley Feed Mill. In 1956, he was a certified dealer under the Emergency Feed Program and had entered into Feed Dealers Agreements with the Commodity Credit Corporation.

Under the Emergency Feed Program, farmers made application for emergency feed to their County A.S.C. Committee. If a farmer was determined to be eligible for assistance by the County Committee, he was issued a Farmers Purchase Order for a specified amount of designated surplus feed grain, which the farmer then transferred to a certified dealer as a part of the purchase price of the designated surplus feed grain. The dealer, within 30 days, then presented such Purchase Order, or Orders, received by him to the County Committee in exchange for a Dealers Certificate in a face value equal to the value of the Purchase Order, or Orders, presented, with which the dealer could then purchase designated surplus feed grain owned by the Commodity Credit Corporation.

Before the dealer presented a Purchase Order to the County Committee, he was required to execute a certification contained in the Purchase Order, which provided as follows:

"SECTION III. CERTIFICATION BY DEALER — RECORD OF PURCHASE.

"(a) I certify that I have sold and actually delivered to the above-named farmer the designated surplus feed grains * * * as shown in the table below * * *.

"(b) I certify that I have accepted the transfer of this Purchase Order in part payment for the quantity of designated surplus feed grains * * * as shown in the table below to the full extent of the value, as specified in Column (C) of such table, for each hundredweight so shown.

* * * * * *

"(d) I certify with respect to this Purchase Order that I have fully complied with all of the provisions of Section 2 of the 'Feed Dealer's Agreement—1955 Emergency

Feed Program,' and that I am entitled under the terms and conditions of such Agreement to present this Purchase Order as the basis for issuance of a Dealer's Certificate."

Part 2 of the Feed Dealers Agreement—1955 Feed Program provides in part as follows:

* * * * * *

"b. The Dealer must have accepted the transfer of the Purchase Order in part payment for the quantity of designated surplus feed grains * * * listed in the table set forth in Section III of the Purchase Order to the full extent of the value, as specified below, for each hundredweight so listed, up to the maximum value of the Purchase Order. The Dealer must have sold and actually delivered to the farmer the quantity of designated surplus feed grains * * * listed in such table and the Purchase Order must have been issued prior to the date on which such designated surplus feed grains * * * were delivered to the farmer. The maximum total value of any Purchase Order shall be an amount equal to the number of hundredweight shown in Section I of the Purchase Order multiplied by $1.00."

The evidence showed that on 15 occasions from April 11, 1956, through July 14, 1956, Fleming accepted Purchase Orders from farmers in the Tucumcari area; gave them a credit on his books for the value of the Purchase Orders, but did not deliver the grain for which the Purchase Orders were redeemed; caused to be executed the Purchase Orders Dealers Certifications; presented such Purchase Orders with invoices attached showing that the farmer had purchased and received a quantity of grain, the charge therefor, less the value of the purchase order, to the County Com-

mittee; received Dealers Certificates therefor; and negotiated such Dealers Certificates.

In 1955, Fleming had hired a manager for his feed business, who had had experience with the Emergency Feed Program. Such manager set up the bookkeeping system used in handling Farmers Purchase Orders, but Fleming was aware of the manner in which the Purchase Orders were being handled.

Fleming testified that over half of the Purchase Orders redeemed by him were sent to him by mail by the farmers to whom they had been issued; that such farmers did not like the feed mixtures which could be purchased with the Purchase Orders and requested him to provide them with mixtures different from those called for by the Purchase Orders; and that his manager therefore devised the arrangement described above, whereby a farmer was given a general cash credit for the value of his Purchase Order, but was not then charged for any grain. At a later time, when the farmer took delivery of a quantity of feed of his specified mixture, the value thereof was debited to his account.

In all except one of the 15 transactions referred to above, grain of some kind, but not established to be designated surplus feed grain, was ultimately delivered to the farmers who had redeemed their Purchase Orders with Fleming, but some of such deliveries were not made until Fleming had been convicted of a criminal offense arising out of the same transactions, and had been placed on probation conditioned upon his delivery of such grain. In one instance a farmer refused to accept Fleming's delivery of such grain, valued at $396.20.

The court found that the 15 Purchase Orders were signed on behalf of Fleming, with his knowledge, when Fleming

knew that he had not delivered the designated surplus grain; that Fleming knew that he had not accepted the Purchase Orders in part payment for the feed indicated on the Purchase Order; that the invoices attached to the Purchase Orders were false and fictitious and known to Fleming to be false and fictitious, in that there had been no purchase of any quantity of feed by the individual named, on the date and in the amounts listed on the invoices; that a credit was given to the account of the person named in the Purchase Order, but such account was not charged with the amount of grain indicated on the invoice; that Fleming submitted the false Purchase Orders with the intent to deceive and defraud the United States and to cause the issuance of Dealers Certificates; that the County Committee issued Dealers Certificates to Fleming because of the false representations made by him or on his behalf; and that Fleming endorsed or caused to be endorsed the Dealers Certificates and received value therefor.[1]

---

1. After the court's findings of fact and conclusions of law were filed, a further hearing was held and the court made certain oral statements, in pertinent part, as follows:

"* * * In order that there will be no misunderstanding of the feeling of the Court in the matter, I wish to dictate certain things into the record and they may be considered as modifications of the Court's findings if the Court's findings are in conflict with what I am about to say.

"* * * I felt, after hearing the evidence, that the defendant intended to do exactly what he did; namely, he turned into the government agencies certificates reciting that he had delivered eligible feed to customers when, in fact, he had not delivered such feed at that time but had credited the customers' accounts with the proper amount of cash credit. That later he delivered feedstuffs of some kind to all of the customers except Mr. Beasley, who refused to receive any feedstuffs; that this feedstuff which he actually delivered was not eligible feed under the program but was such feed or mixtures as the customers may have ordered.

* * * * * *

"* * * My feeling was that judgment should be for the Government, because he certified to something that was not true and correct, in that he certified that he had delivered eligible feeds when, in truth and in fact, he had at that time not delivered any feed and thereafter didn't deliver the eligible feeds but did deliver other feeds that the customer may have ordered.

* * * * * *

"There is no question that he had not delivered the feed and that the certificates were false, because he had not delivered the feeds that he certified he had delivered."

The court made no finding as to damages, but concluded that "Pursuant to the provisions of Title 31 U.S.C. 231, the plaintiff is entitled to double the damages sustained as a result of the Hubert Beasley claim which was in the amount of $396.20, for a total of $792.40."

The sole contention raised by Fleming is that the United States, in order to establish its case under the False Claims Act, must prove all the elements ordinarily required in an action for damages for fraud, and that since the United States did not do so, the court erred in entering judgment for the United States. We are of the opinion that the meaning of the portion of the Act applicable to Fleming is clear and unambiguous and contains no such requirement.

Section 231 of the False Claims Act, 31 U.S.C.A. § 231 et seq., provides as follows:

"Any person not in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States, *who shall make or cause to be made, or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, any claim upon or against the Government of the United States, or any department or officer thereof, knowing such claim to be false, fictitious, or fraudulent*, or who, for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry, or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States, or any department or officer thereof, by

obtaining or aiding to obtain the payment or allowance of any false or fraudulent claim, or who, having charge, possession, custody, or control of any money or other public property used or to be used in the military or naval service, who, with intent to defraud the United States or willfully to conceal such money or other property, delivers or causes to be delivered, to any other person having authority to receive the same, any amount of such money or other property less than that for which he received a certificate or took a receipt, and every person authorized to make or deliver any certificate, voucher, receipt, or other paper certifying the receipt of arms, ammunition, provisions, clothing, or other property so used or to be used, who makes or delivers the same to any other person without a full knowledge of the truth of the facts stated therein, and with intent to defraud the United States, and every person who knowingly purchases or receives in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person called into or employed in the military or naval service any arms, equipments, ammunition, clothes, military stores, or other public property, such soldier, sailor, officer, or other person not having the lawful right to pledge or sell the same, shall forfeit and pay to the United States the sum of $2,000, and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit." (Emphasis supplied.)

The first portion of the Act, that which the United States claims Fleming violated, provides for liability in the event of a "false, fictitious *or* fraudulent" claim. By the use of the disjunctive "or" Congress made it clear that any one

of the three wrongful types of claim would subject the claimant to liability and that the claim need not be "fraudulent" so long as it is "false."

Further, it should be noted that the Act provides for six different eventualities which will give rise to liability for a $2,000 forfeiture and double damages: (1) Presenting a claim upon the Government, knowing it to be false; (2) using a document known to contain a fraudulent statement or entry to obtain the payment or approval of a claim; (3) conspiring to defraud the United States by obtaining the payment of a false or fraudulent claim; (4) delivering military money or property less than that for which a receipt is received, with intent to defraud or conceal; (5) delivering a receipt for property without a full knowledge of the truth of the facts stated therein, with intent to defraud the United States, and (6) purchasing or receiving in pledge property from a member of the military forces, knowing that such person does not have the lawful right to pledge or sell such property.

Only the third and fifth of such eventualities contains the element of fraud or intent to defraud as an absolute, rather than an alternative element. Had Congress intended to incorporate fraud or intent to defraud into each portion of the Act, it is unlikely that it would have done so expressly in two portions and not in the remaining portions.

Moreover, where a person files a claim, which he knows is false, for the purpose of obtaining approval or payment of the claim, we think there is a reasonable inference, almost a necessary implication, that he intends to deceive.

The trial court here found an intent to deceive and the evidence sustains that finding.

Proof of damage to the Government resulting from a false claim is not a necessary part of the Government's case under the Act.[2] If damage is proved by the Government, as it was in the instant case as to one of Fleming's false claims, it is entitled to recover double the amount so proved in addition to the $2,000 forfeiture, but upon adequate proof of the making of a claim upon the Government, knowing it to be false, the United States is entitled, without proof of damage, to recover the forfeiture.

Under the first portion of § 231 it is necessary only that the claimant made a claim upon or against the Government of the United States, knowing it to be false, in order to incur liability.

Fleming caused the 15 Farmers Purchase Orders to be presented to the County Committee for the purpose of obtaining Dealers Certificates, which were valuable pieces of property, and in our opinion such Purchase Orders were claims as contemplated by the False Claims Act.[3] And the Commodity Credit Corporation is a part of the "Government of the United States" for purposes of the Act.[4]

The fact that Fleming caused 15 Purchase Orders to be filed, knowing that the statements contained therein that the feed had been "actually delivered" to the purchaser were false, is uncontroverted and Fleming does not contend otherwise. Thus, the United States proved, and the court below found all the facts necessary to establish Fleming's

---

2. Toepleman v. United States, 4 Cir. 263 F.2d 697, 699, c.d. 359 U.S. 989, 79 S.Ct. 1119, 3 L.Ed.2d 978; United States v. American Precision Products Corp., D.C.N.J., 115 F.Supp. 823, 827, 828; See also: Berenbeim v. United States, 10 Cir., 164 F.2d 679, 683, c.d. 333 U.S. 827, 68 S.Ct. 454, 92 L.Ed. 1113.

3. Sell v. United States, 10 Cir., 336 F.2d 467; United States v. Borth, 10 Cir., 266 F.2d 521, 523; United States v. McNinch, 356 U.S. 595, 599, 78 S.Ct. 950, 2 L.Ed.2d 1001.

4. Sell v. United States, 10 Cir., 336 F.2d 467; Rainwater v. United States, 356 U.S. 590, 592, 78 S.Ct. 946, 2 L.Ed.2d 996.

liability for forfeitures for 15 violations of the Act and for double the damages suffered by the United States as the result of one of such claims.

The judgment is affirmed.

JUDGMENT

Thirty-Eighth Day, July Term, Thursday, September 3rd, 1964.

Before Honorable Orie L. Phillips and Honorable David T. Lewis, Circuit Judges, and Honorable A. Sherman Christensen, District Judge.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 728

DON FLEMING, D/B/A GREEN VALLEY FEED MILL,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The United States brought this action against petitioner to recover statutory forfeiture and double damages as provided in the False Claims Act, 31 U.S.C. 231, *et seq.* Following a trial, the district court entered judgment for the United States and the court of appeals affirmed.

In his capacity as a certified dealer under the 1955 Emergency Feed Program administered by the Department of Agriculture, petitioner obtained from farmers the purchase orders which had been issued to them by the County Agricultural Stabilization and

759-505—64

Conservation Committee for use as part payment in the acquisition of certain specified types of surplus feed grains. These purchase orders were in turn exchanged by petitioner for negotiable dealer's certificates, which entitled the holder to obtain the surplus feed grain covered by the purchase orders from government sources. In presenting the purchase orders to the County Committee for exchange, petitioner was required to certify that he had sold and actually delivered to the named farmer the designated surplus feed grain; that he had accepted the purchase order in part payment for that quantity of grain; and that he had fully complied with the provisions of the Feed Dealers Agreement, which he had executed in order to become a certified dealer.

The district court found that petitioner's certifications here involved were known by him to be false at the time they were submitted to the County Committee together with invoices made by him falsely showing sale and delivery (R. 17–18).[1] In fact, petitioner had

[1] "R" references are to the multilithed transcript of record submitted to the court of appeals and on file with this Court.

It should be noted that petitioner's admitted making and using of false invoices showing delivery of feed which in fact had not been delivered (R. 60) in order to obtain the dealer's certificates would appear to fall within the portion of the statute which makes liable any person who "for the purpose of obtaining or aiding to obtain the payment or approval of such claim, makes, uses, or causes to be made or used, any false bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement of entry."

not delivered any grain to the farmers in question at the time the certifications were made (R. 17–18, 65–66). Moreover, while petitioner subsequently made grain deliveries to all but one of the farmers, the grain delivered was not the same kind as had been certified; nor had petitioner intended that it would be (R. 65–66).

In this Court, petitioner does not contest the finding that his certifications were knowingly false. Nor, as we read his petition, does petitioner challenge the additional findings (1) that the misrepresentations were material (R. 18); and (2) that it was petitioner's contemplation that the false certifications would be relied upon by the government (as they were) in issuing the dealer's certificates (R. 18) which petitioner negotiated for value (R. 57).

In these circumstances, as both courts below recognized, liability under the False Claims Act is clear. In the terms of the Act, there was a presentation "for payment or approval" of a claim against the Government by petitioner "knowing such claim to be false, fictitious or fraudulent," 31 U.S.C. 231.

Contrary to petitioner's assertions, there is nothing in the relevant portions of the Act requiring the government to establish an intent to defraud the United States. In any event, the district court expressly determined that petitioner "knowingly submitted the false Purchase Orders * * * with intent to deceive and defraud the United States * * *" (R. 18).

While the court later indicated that it was not finding that petitioner intended to defraud his farmer customers as well, this is of no aid to petitioner.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

DECEMBER 1964.